Supreme Court, U. S.
FILED
JAN 23 1998
CLERK

No. 97-910

In The

Supreme Court of the United States

October Term, 1997

CAROL KIKER and DEVON KIKER,

Petitioners,

v.

PAUL J. MILLER, JR., individually and as Circuit Judge of the Circuit Court of Russell County; and JOHN PELHAM FERRELL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT JOHN PELHAM FERRELL'S BRIEF IN OPPOSITION

RECEIVED
JAN 23 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RONALD G. DAVENPORT
Counsel of Record
WILLIAM H. WEBSTER
RUSHTON, STAKELY, JOHNSTON & GARRETT, P.A.
184 Commerce Street
Post Office Box 270
Montgomery, Alabama 36101-0270
(334) 206-3100

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTION PRESENTED

I. Whether the United States Court of Appeals for the Eleventh Circuit properly upheld the district court's order dismissing Carol Kiker's claim under 42 U.S.C. § 1983 that Pelham Ferrell, a private attorney, engaged in a conspiracy to deny Carol Kiker her due process rights in removing her as Register of the Circuit Court of Russell County.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii

CITATIONS OF OPINIONS AND ORDERS BELOW .. 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT..... 11

ARGUMENT..... 13

CAROL KIKER'S PROCEDURAL DUE PROCESS CLAIM WAS PROPERLY DISMISSED..... 13

CONCLUSION..... 28

APPENDIX.....App. 1

TABLE OF AUTHORITIES

Page

CASES

Adickes v. S.H. Kress, 398 U.S. 144 (1970) 19

Alabama Elec. Co-operative, Inc. v. Alabama Power Co., 278 Ala. 123, 176 So. 2d 483 (1964) 27

Bailey v. Board of County Comm'rs of Alachua County, Fla., 956 F.2d 1112 (11th Cir. 1992) 20, 26

Buxton v. City of Plant City, 871 F.2d 1037 (11th Cir. 1989) 16

Cleckner v. Republic Van & Storage Co., 556 F.2d 766 (5th Cir. 1977) 17

Constantine v. United States Fid. & Guar. Co., 545 So. 2d 750 (Ala. 1989) 18, 21

District of Columbia Ct. of App. v. Feldman, 460 U.S. 462 (1983) ..... *passim*

Doe v. Garrett, 903 F.2d 1455 (11th Cir. 1990) 16

Evans v. City of Huntsville, 580 So. 2d 1323 (Ala. 1991) 25, 26

Ex parte Bracken, 263 Ala. 402, 82 So. 2d 629 (1955) 26

Ex parte Greenberg, 395 So. 2d 1000 (Ala. 1981) 26

Ex parte Kiker, 612 So. 2d 453 (Ala. 1993) 8, 19

Holloway v. Personnel Bd. of Jefferson County, 528 So. 2d 341 (Ala. Civ. App. 1988) 25

Interstate Elec. Co. v. Fidelity & Deposit Co. of Md., 228 Ala. 210, 153 So. 427 (1934) 18

Kiker v. Miller, 629 So. 2d 815 (Ala. 1993) (Table) 1, 11, 17, 22

Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982) 17

TABLE OF AUTHORITIES – Continued

Page

Liedel v. Juvenile Ct. of Madison County, Ala., 891 F.2d 1542 (11th Cir. 1990) 16

Marshall Durbin & Co. v. Alabama Dep't of Envtl. Mgt., 537 So. 2d 490 (Ala. Civ. App. 1987), *rev'd on other grounds*, 537 So. 2d 496 (Ala. 1988) 25

Mays v. Brent, 546 F.2d 1154 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977) 17

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994), *cert. denied*, 114 S. Ct. 898 (1995) 14

Minton v. Personnel Bd. of Jefferson County, 406 So. 2d 435 (Ala. Civ. App. 1981) 25

Mitchell v. Humana Hosp.-Shoals, 942 F.2d 1581 (11th Cir. 1991) 18

Montana v. United States, 440 U.S. 147 (1979) 17

N & C Properties v. Windham, 582 So. 2d 1044 (Ala. 1991) 18

O'Reilly v. Ceuleers, 912 F.2d 1383 (11th Cir. 1990) 12

Personnel Bd. of Jefferson County v. Bailey, 475 So. 2d 863 (Ala. Civ. App. 1985) 26

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) .. *passim*

Salve Regina College v. Russell, 499 U.S. 225 (1991) 12

Sykes v. State of Cal. (Dep't of Motor Vehicles), 497 F.2d 197 (9th Cir. 1974) 19

Temple v. Albert, 719 F. Supp. 265 (S.D.N.Y. 1989) 19

Villanueva v. McInnis, 723 F.2d 414 (5th Cir. 1984) 20

Webb v. State of Ala., 850 F.2d 1518 (11th Cir. 1988) 22, 24, 27

TABLE OF AUTHORITIES – Continued

Page

Williams v. Adkinson, 792 F. Supp. 755 (M.D. Ala. 1992), *aff'd mem.*, 987 F.2d 774 (11th Cir. 1993).... 15, 16

Wood v. Orange County, 715 F.2d 1543 (11th Cir. 1983)..... 15

OTHER AUTHORITIES:

28 U.S.C. § 1254..... 2

28 U.S.C. § 1257 (1988)..... 2, 15

28 U.S.C. § 1738 (1988)..... 17, 24

28 U.S.C. § 2111 (1988)..... 12

42 U.S.C. § 1983 (1988)..... 19, 20, 28

Ala. Code § 12-17-24 (1995)..... 5, 19

Ala. Code § 12-17-110 (1995)..... 5, 19

Ala. Code §§ 12-17-110(c), 12-17-24 (1995)..... 19

Ala. Code § 12-17-115 (1995)..... 10

Ala. R. App. P. 21..... 10, 23, 24

Ala. R. App. P. 53(a)(1)..... 11, 22

Ala. R. App. P. 53(a)(2)(A)..... 11, 22

Ala. R. Civ. P. 1..... 5

Ala. R. Civ. P. 3..... 5

Fed. R. Civ. P. 12(b)(6)..... 21

U.S. Const. amend. I..... 2, 4, 13, 20

U.S. Const. amend. XIV..... 14

TABLE OF AUTHORITIES – Continued

Page

RULES:

Rule 10 12

Rule 10(b) 24

CITATIONS OF OPINIONS AND ORDERS BELOW

Kiker v. Miller, 124 F.3d 1301 (Table) (11th Cir. 1997) (rehearing and suggestion of rehearing en banc denied without opinion);

Kiker v. Miller, 110 F.3d 798 (Table) (11th Cir. 1997) (appeal denied without opinion);

Kiker v. Miller, Case No. CV-T-056-E (M.D. Ala., Mar. 21, 1994) (Unpublished order dismissing due process claims) (see Petitioner's App. 12-13).

Related opinions and orders

Kiker v. Miller, 639 So. 2d 961 (Ala. 1993) (Table) (rehearing denied)

Kiker v. Miller, 629 So. 2d 815 (Ala. 1993) (Table) (affirming order removing Carol Kiker as Register)

Ex parte Kiker, 612 So. 2d 453 (Ala. 1993) (denying writ of mandamus seeking Judge Paul J. Miller's recusal)

JURISDICTION

This petition seeks review of the Eleventh Circuit Court of Appeals' opinion denying the petition for rehearing and suggestion of rehearing en banc filed by Carol Kiker and Devon Kiker (hereinafter referred to collectively as "Petitioners" or "the Kikers"). Petitioners cannot, as they suggest, invoke the jurisdiction of this

Court pursuant to 28 U.S.C. § 1257. Under the circumstances, the proper basis for jurisdiction in this Court is 28 U.S.C. § 1254.

STATEMENT OF THE CASE

I. Course of Proceedings Below

On January 18, 1994, Carol Kiker filed a complaint seeking declaratory, injunctive and monetary relief against defendants Judge Paul J. Miller, Jr. and John Pelham Ferrell. In her Complaint, Carol Kiker alleged that Miller and Ferrell had, *inter alia*, violated her rights to procedural and substantive due process arising from her removal from the office of Register in Equity of Russell County, Alabama.[1]

Because each of her allegations had been raised and rejected by the Alabama Supreme Court in a direct appeal from Judge Miller's removing Carol Kiker from office, both defendants moved to dismiss the complaint and filed extensive excerpts from prior state court proceedings, relying upon the doctrines of res judicata, collateral estoppel, the "*Rooker-Feldman*[2] doctrine" of federal district court non-jurisdiction over claims previously

---

[1] Carol Kiker also alleged violations of her First Amendment right to free speech and association regarding "retaliation" against her for her activities in support of a pay raise for state personnel.

[2] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923); *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 483 (1983).

decided by the highest courts of a state, and (by Judge Miller only) the doctrines of absolute and qualified immunity.

Following briefs and a hearing, the district court denied Carol Kiker's motion for a temporary restraining order and her request for a preliminary injunction. Petitioners' App. 14-26. To the extent they were directed to the due process claims raised in the complaint, the district court granted the defendants' motions to dismiss on March 21, 1994. Petitioners' App. 12-13.

On June 6, 1994, Carol Kiker moved to amend her complaint to allege insufficiency of state remedies regarding her purported constitutional deprivations. Also, on August 25, 1994, she attempted to reopen her procedural due process claims and requested a "name-clearing hearing" as supplemental relief.[3]

The complaint was thereafter amended to add as a party plaintiff Carol Kiker's husband, Devon Kiker, who was then (and still is) the Circuit Clerk of Russell County. This amended complaint included allegations by Devon Kiker that the Defendants had "retaliated" against him. Defendants moved to dismiss this amended Complaint and later moved for summary judgment as to all of the Kikers' remaining claims. The district court allowed the Kikers' motion to amend the complaint but on the same day ruled in favor of both defendants with respect to Devon Kiker's claims as amended. Petitioners' App. 5-11.

---

[3] These requests were subsequently denied. A later request that the district court judge recuse himself was also denied.

This ruling effectively dismissed Devon Kiker as a plaintiff in this action.

On November 29, 1996, the district court ruled in favor of Ferrell and against Carol Kiker on his motion for summary judgment, and Ferrell was dismissed from the case. Petitioners' App. 4. Carol Kiker's motions for permission to appeal several nonfinal orders entered by the district court were subsequently denied.

The only remaining claim, in which Carol Kiker alleged that Judge Miller had retaliated against her because she had exercised her First Amendment rights, was tried before a jury over four days in April 1996. The jury returned a verdict in favor of Judge Miller, finding that Carol Kiker had failed to prove by a preponderance of the evidence that her activities regarding a pay raise for state personnel were a motivating factor in her firing. Respondent's App. 1-2.

The Kikers' Notice of Appeal was filed in the district court on May 10, 1996. On March 7, 1997, The United States Court of Appeals for the Eleventh Circuit entered an order affirming the district court. Petitioners' App. 3. The Kikers' petition for rehearing and suggestion of rehearing en banc was denied on September 2, 1997. Petitioners' App. 1-2. The Kikers thereafter filed a petition for writ of certiorari in this Court.

II. Statement of the Facts

This appeal is based upon a bitter dispute between a disgruntled state employee against the official who had the statutory power to remove her from her position, a

dispute which has unfortunately ensnared a former private attorney practicing in Russell County, Alabama. Carol Kiker is the former "Register in Equity" of Russell County, Alabama, a position that was prospectively abolished upon Alabama's procedural merger of law and equity cases in circuit court. *See generally* Ala. Code § 12-17-110 (1995), Ala. R. Civ. P. 1, 3. Carol Kiker was appointed to this position prior to the abolition of her office, and thus the position of Register in Russell County continued to exist under a grandfathering provision that allowed for Alabama's Registers holding office on October 10, 1975, to remain in office by a "negative reappointment" mechanism until their eligibility for retirement compensation. Ala. Code § 12-17-110(a), (b) (1995). Registers under Alabama law are "subject to removal" by their respective circuit judges "for cause by order to be entered at length on the minutes of the court." *Id.* (c).

Defendant Judge Paul J. Miller is the Presiding Judge of the Circuit Court of Russell County, and the official possessing supervisory authority over Carol Kiker. Ala. Code § 12-17-24 (1995). Defendant Pelham Ferrell is an attorney formerly in private practice (now retired) in Russell County who has been named as Judge Miller's "co-conspirator" in this action.

In 1992, the Russell County District Attorney's office filed certain motions in an ongoing domestic relations case, styled *Michael Devon Kiker v. State of Alabama ex rel. Lisa M. Hutchinson*, DR 89-268.01. The defense motions sought a change in the collection site of child support payments owed by Michael Devon (Mickey) Kiker, Carol Kiker's step-son, as well as an increase in child support and reimbursement for medical bills. The collection site

motion was filed on March 2, 1992; however, contrary to usual practice in Russell County, the motion was not assigned a judge and a court date within three to five days, and the D.A.'s office filed a motion to set a hearing on April 1, 1992. The motions for additional child support and for medical reimbursement were filed by April 8, 1992. No court date on these motions was ever assigned until the parties had reached an agreement on a proposed order.[4] At that time, state's counsel hand-delivered the file to a judge's office for a ruling.

Similarly, the District Attorney's office became involved in the enforcement of a Georgia divorce decree dissolving the marriage of Patricia Sue Kiker and Paul Kiker (Carol Kiker's son). Sue Kiker requested the assistance of the Department of Human Resources in enforcing her divorce decree, and the D.A.'s office filed a rule nisi complaint on Sue Kiker's behalf on April 24, 1992. A separate complaint for divorce filed by the husband, Paul Kiker, was received by the D.A.'s office on May 14, 1992; although Sue Kiker's filing occurred some two to three weeks prior to Paul Kiker's filing, both were assigned sequential case numbers, DR 92-190 and DR 92-191. In fact, in the normal course of affairs in the Register's office, between two and ten file numbers should have been interposed each day between the filing of the two actions. The delay in having a court date immediately set

---

[4] The lack of a court date worked to dissuade the contestants from settling their differences regarding the child support matters involved; in contrast, parties to such motions generally settle their differences more quickly when a court date has been set.

for hearing Sue Kiker's action disadvantaged her by delaying the relief requested in her complaint, i.e., enforcement of the Georgia divorce decree.

After Judge Miller became aware of the handling of these files by the Register's office, he consulted two Phenix City attorneys, Pelham Ferrell and Buster Landreau, concerning the legal question whether a Register could be removed simply by an entry of an order of the court entered on the minutes of the court or whether a hearing should be afforded. Ferrell understood Judge Miller to be considering Carol Kiker's removal because of the extensive newspaper publicity and contacts made by Carol Kiker's former daughters-in-law with Judge Miller, although Ferrell was never given specific information as to the motive for Judge Miller's request. Ferrell informed Judge Miller that it would be better for Judge Miller to grant a hearing comporting with the basic tenets of due process.

Judge Miller thereafter ordered Carol Kiker to show cause why DR 92-190 and DR 89-268-01 (Carol Kiker's son's and stepson's cases) were not processed in accordance with standard procedures and why she should not be removed from office. The show cause order set a specific hearing date, and stated that the Alabama Rules of Civil Procedure would apply at the hearing to show cause. Ferrell, the alleged "co-conspirator", had nothing to do with the issuance or wording of this order, nor did he have any influence upon Judge Miller's adverse decisions on Carol Kiker's recusal and discovery motions. Carol Kiker's motions seeking recusal and pre-hearing deposition testimony were denied, and the denial was upheld by the Alabama Supreme Court on mandamus. *Ex*

parte Kiker, 612 So. 2d 453 (Ala. 1993) (Petitioners' App. 32-37).

The show cause hearing was held in open court on February 9, 1993, and Judge Miller asked Ferrell to attend the hearing, not in any official capacity but simply as Judge Miller's long-time friend. Although there is a dispute as to whether Ferrell nodded or made physical motions in Judge Miller's direction, it is undisputed that Ferrell did not advise Judge Miller about evidentiary rulings or the sufficiency of the proof to warrant Carol Kiker's dismissal. In any event, any such physical motions on the part of Ferrell did not affect any of Judge Miller's rulings at the hearing.

Ferrell became aware for the first time of Judge Miller's decision to dismiss Carol Kiker when he saw a draft order that Judge Miller requested he review. Ferrell noted that the draft contained the words "ore tenus in open court," and advised Judge Miller that placing "open court" and "ore tenus" together would be redundant. This was the entire extent of "co-conspirator" Ferrell's participation in the show cause proceedings.

Judge Miller executed an order on February 16, 1993, removing Carol Kiker from the office of Register of Russell County. Petitioners' App. 29-31. This order contained the following pertinent findings:

> 2. That although the Supreme Court previously noted it was not necessary that a show cause hearing be conducted by this Court, the Court, nevertheless, felt the Register should be given an opportunity to assert for the record why the files herein under consideration were

treated differently from others; but no substantial or material evidence to such effect was forthcoming from the Register or on her behalf.

3. That in hundreds of cases of a similar nature to that filed in Case No. DR 89-268.01 involving Michael D. Kiker, stepson of the Register and son of the Clerk of this Court, and Case No. DR 92-190 involving Ronald P. Kiker, son of the Register and stepson of the Clerk of this Court, hearing dates were set by the Register's office and submitted back to the office of the District Attorney with a hearing date within a two to three week period; however the two cases under consideration were the only ones which were not processed in such way and which were not scheduled for a hearing before the proper Judge.

4. That, in fact Case No. DR 89-268.01 involving Michael D. Kiker, son of the Clerk of this Court and stepson of the Register, was never submitted to a Judge for a hearing even though it was in the Register's and Clerk's office for a period of some four months.

5. That in Case No. DR 92-190 involving Ronald P. Kiker the complaint was stamped in and dated, but this case was not given a file number or assigned to a Judge until Ronald P. Kiker filed a complaint for divorce and petition for modification of divorce judgment. At that time, the register opened a new file (DR 92-191) and assigned consecutive case numbers to these cases.

6. That both of the petitioners, former daughters-in-law of the Register and Clerk of this Court, suffered monetary losses in child support and potential deprivation of medical

> care of their children since these cases were not treated in the ordinary course of business.
>
> 7. That the Register failed to endorse the true date of filing on certain of the pleadings received by her in her office pursuant to Section 12-17-115 of the *Code of Alabama*.
>
> 8. That the Register was guilty of wilful negligence of duty and the intentional omission of an act of duty in the cases under consideration.
>
> 9. That the integrity of the entire judicial system is seriously affected when officers of the court system deprive people of the right to due process or show favoritism to members of their family. The judicial system cannot condone such conduct.

Petitioners' App. 29-30.

Carol Kiker immediately filed a notice of appeal to the Alabama Supreme Court, along with other filings that in no way resembled a petition for certiorari under Rule 21 of the Alabama Rules of Appellate Procedure or under common law, as she now purports. On the contrary, Carol Kiker's actions and statements before the Alabama Supreme Court indicate that she considered herself to be an appellant pursuing an appeal rather than a petitioner seeking an extraordinary writ.

Before the Alabama Supreme Court, Carol Kiker repeatedly alleged and argued as her principal issues that Judge Miller's actions deprived her of procedural and substantive due process. However, despite her allegations of constitutional infirmities in her removal, the Alabama Supreme Court affirmed Carol Kiker's removal, citing

Rules 53(a)(1) and 53(a)(2)(A), Ala. R. App. P. *Kiker v. Miller*, 629 So. 2d 815 (Table) (Ala. 1993) (per curiam) (See Petitioners' App. 28). On the same day, the Alabama Supreme Court issued its "Certificate of Judgment of Affirmance," which provided as follows:

> The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the Court below is affirmed.

Respondent's App. 3.

Carol Kiker's application for rehearing (which raised the same constitutional issues) was overruled by the Alabama Supreme Court. *Kiker v. Miller*, 639 So. 2d 961 (Table) (Ala. 1993) (per curiam) (See Petitioners' App. 27). The Kikers did not petition this Court for a writ of certiorari based on the Alabama Supreme Court's order, but instead sought relief in federal district court.

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

I. Standard of Review

Petitioners request this Court to review the Eleventh Circuit's denial of a petition for rehearing and suggestion of rehearing en banc regarding Carol Kiker's due process claims, which were dismissed by the district court and affirmed on appeal.[5]

[5] Although Petitioners appealed the district court's order dismissing Devon Kiker's claims, they have apparently chosen

In so doing, Petitioners raise federal questions as to the applicability of Alabama's law of collateral estoppel and res judicata, as well as the *Rooker-Feldman* doctrine. These questions of state and federal law are subject to *de novo* review in the courts of appeals. *O'Reilly v. Ceuleers*, 912 F.2d 1383, 1385 (11th Cir. 1990); *Salve Regina College v. Russell*, 499 U.S. 225, 232 (1991). Appellate review is also guided by the application of the harmless error doctrine, which mandates that a reviewing court give judgment "without regard to errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111 (1988). In this Court, "[r]eview on a writ of certiorari is not a matter of right but of judicial discretion," which "will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court. Petitioners have offered no compelling reasons for the exercise of this Court's discretion.

II. Summary of Argument

The only issue preserved for this Court relating to Respondent Pelham Ferrell is whether Ferrell acted jointly and/or in concert with Judge Miller to deprive Carol Kiker of procedural due process rights in connection with her removal as Register.[6]

---

not to raise any issues related to those claims in this Court. (See Petitioners' Brief, pp. i, 6, 7, 11, 12, 14, 15).

[6] See previous footnote.

On state appellate review (not certiorari review as the Kikers now contend), the Alabama Supreme Court previously ruled that Carol Kiker's show cause hearing before Judge Miller comported with constitutionally mandated procedural due process guarantees, and it rejected Carol Kiker's contentions to the contrary. Carol Kiker's civil rights conspiracy claims against Ferrell alleging that he "acted in concert" to deprive her of procedural due process during her show cause hearing are thus foreclosed by the judgment of the Alabama Supreme Court, both by virtue of the Alabama doctrines of res judicata and collateral estoppel and by the *Rooker-Feldman* doctrine, and were correctly dismissed by the district court.

ARGUMENT

CAROL KIKER'S PROCEDURAL DUE PROCESS CLAIM WAS PROPERLY DISMISSED

Following the demise of her First Amendment retaliation claims against Judge Miller as a result of the jury's verdict in the district court,[7] Petitioners sought Eleventh Circuit review of, *inter alia*, the district court's March 21, 1994 order dismissing Carol Kiker's due process claims against both defendants on the basis of claim and issue

[7] Indeed, Petitioners failed to raise any issues regarding the soundness of the jury's verdict, which destroys any conceivable basis for concluding that Carol Kiker's dismissal as Register was motivated by her exercise of First Amendment rights, i.e., her lobbying for a judicial pay raise. Similarly, Plaintiffs have not challenged on appeal the district court's parallel order granting summary judgment to Ferrell on her First Amendment claims.

preclusion. Having failed to procure a favorable result in the Eleventh Circuit, Petitioners desperately call upon this Court to grant a writ of certiorari based on arguments which have been exhaustively briefed, considered, and rejected in each court to which Petitioners have resorted.

While Carol Kiker, and later both the Kikers, contended in their complaint as amended that Miller's dismissal of Carol Kiker as Register violated both procedural and substantive due process rights, the Kikers conceded below (Petitioners' Brief to the Eleventh Circuit, p. 30) that their substantive due process claim is precluded by *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 114 S. Ct. 898 (1995).[8] Moreover, although Petitioners raised various issues relating to Devon Kiker's claims in their brief to the Eleventh Circuit, they have apparently chosen not to pursue those issues in their petition to this Court.

Thus, the sole potentially viable claim Petitioners have preserved for this Court's review is Carol Kiker's allegation that her dismissal violated procedural due process under the Fourteenth Amendment to the United States Constitution. However, as will be demonstrated,

---

[8] In *McKinney*, the Eleventh Circuit stated that "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because substantive due process rights are created only by the Constitution." *McKinney*, 20 F.3d at 1554 (internal quotations omitted).

her procedural due process claim has been fully considered and rejected outright by the Alabama Supreme Court. Therefore, as the district court correctly ruled, these claims are now unreviewable by any federal court, Petitioners having failed to challenge the Alabama Supreme Court's 1993 decision by filing a timely petition for writ of certiorari to this Court. Petitioners back-door attempt to procure further review of issues long ago put to rest by the Alabama Supreme Court must fail. Therefore a writ of certiorari is not warranted in this case.

A. The District Court Lacked Subject-Matter Jurisdiction Over Carol Kiker's Procedural Due Process Claim.

A federal district court is without authority to review final determinations of the highest court of a state; review of such determinations may only be obtained in the United States Supreme Court. *See* 28 U.S.C. § 1257 (1988); *Rooker v. Fidelity Trust Co.*, 263 U.S. at 415, 416; *District of Columbia Ct. of App. v. Feldman*, 460 U.S. at 483. The *Rooker-Feldman* doctrine extends to reach not only a *direct* review of a state court determination of state law, but also *collateral review* of state judicial proceedings in which state tribunals decide federal constitutional questions in a manner that is inextricably intertwined with a decision not to grant relief to a petitioning litigant. *Feldman*, 460 U.S. at 483-84 n. 16, 486-87; *Wood v. Orange County*, 715 F.2d 1543 (11th Cir. 1983); *Williams v. Adkinson*, 792 F. Supp. 755, 762 (M.D. Ala. 1992), *aff'd mem.*, 987 F.2d 774 (11th Cir. 1993).

In this case, Carol Kiker asserted deprivations of procedural due process rights in connection with her show cause hearing and pre-hearing discovery that are precisely the same allegations that she unsuccessfully argued before the Alabama Supreme Court; it cannot be said that the state appellate forum did not afford a full and fair opportunity to assert all possible constitutional arguments for restoring plaintiff to office. *See Liedel v. Juvenile Ct. of Madison County, Ala.*, 891 F.2d 1542, 1545-46 (11th Cir. 1990). As the district court in this case previously noted in *Adkinson*, "this court is not a court of error for . . . the Alabama Supreme Court." 792 F. Supp. at 767. Accordingly, the district court correctly concluded that it had no jurisdiction over Carol Kiker's renewed procedural due process claims, and correctly dismissed them for lack of subject-matter jurisdiction.[9]

---

[9] Petitioners' contention that Carol Kiker was due a "name-clearing hearing" (*see Buxton v. City of Plant City*, 871 F.2d 1037 (11th Cir. 1989)) was therefore necessarily foreclosed as well. As the Eleventh Circuit has noted, "A critical element of a claimed invasion of a reputational liberty interest . . . is the *falsity* of the government's asserted basis for the employment decision at issue." *Doe v. Garrett*, 903 F.2d 1455, 1461-62 (11th Cir. 1990). The Alabama Supreme Court's affirmance of the Order issued by Judge Miller precludes any dispute that Judge Miller's findings as to Carol Kiker's differential treatment of court files were in fact correct; moreover, the Alabama Supreme Court's rejection of her due process arguments bars any conclusion that Plaintiff was denied a meaningful opportunity to clear her name by showing cause for her differential treatment of the files in question.

B. Alabama's Doctrine of Collateral Estoppel Precludes Re-examination in Federal Court of Previously Determined Issues Regarding Carol Kiker's Procedural Due Process Claim.

Pursuant to 28 U.S.C. § 1738, the acts and judicial proceedings of any court of any state shall have "the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of the state from which they are taken." This federal statute has been interpreted so as to bar re-litigation in federal court of claims or issues previously determined by state courts. *E.g., Cleckner v. Republic Van & Storage Co.*, 556 F.2d 766, 769 (5th Cir. 1977); *Mays v. Brent*, 546 F.2d 1154 (5th Cir.), *cert. denied*, 434 U.S. 850 (1977); *Montana v. United States*, 440 U.S. 147, 162-64 (1979). As this Court has noted, "[s]ection 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 466 (1982). *Kremer* also dispels any notion that a judgment of a state appellate court upholding allegedly wrongful administrative action has any less preclusive effect than other judgments originating from that state's courts. 456 U.S. at 479-80 & n. 21.

As discussed in the Statement of the Facts and in the preceding argument, although Carol Kiker raised procedural due process as an issue on appeal in state court, the Alabama Supreme Court affirmed Judge Miller's dismissal order without a full written opinion. *Kiker v. Miller*, 629 So. 2d 815 (Ala. 1993) (table). Thus, because it was an Alabama appellate court which upheld Carol Kiker's dismissal, one must turn to Alabama law to determine the

preclusive effects of the judgment of the Supreme Court of Alabama that the removal of plaintiff as Register deprived her of no constitutionally protected rights.

Under Alabama law, the doctrine of collateral estoppel, or issue preclusion, is applied by Alabama courts when (1) the issue is identical to one involved in the previous suit; (2) the issue was actually litigated in the previous action; and (3) resolution of the issue was necessary to the prior judgment. *N & C Properties v. Windham*, 582 So. 2d 1044, 1046 (Ala. 1991). Two other requirements must be made with regard to the parties involved: (1) the party *claiming the benefit* of the prior judgment as an estoppel against the adversarial party is one who would have been prejudiced by a contrary decision in the previous case; and (2) *the party against whom the estoppel by judgment is sought* either was an actual party in the previous case or was in privity with, or is a successor to the rights of, an actual party in the previous case. *Constantine v. United States Fid. & Guar. Co.*, 545 So. 2d 750, 755-56 (Ala. 1989); *accord, Mitchell v. Humana Hosp.-Shoals*, 942 F.2d 1581, 1582 (11th Cir. 1991). Thus, allowing a litigant who did not participate in the former action to raise an estoppel bar "is justified by the injustice which would result in allowing a recovery against a defendant for conduct of another, when that other has been exonerated in a direct suit." *Constantine*, 545 So. 2d at 755-56 (quoting *Interstate Elec. Co. v. Fidelity & Deposit Co. of Md.*, 228 Ala. 210, 153 So. 427 (1934)).

Applying Alabama principles of issue preclusion to the facts present here, it is clear that issue preclusion should apply. The Kikers called upon the district court and the Eleventh Circuit to re-examine whether Carol

Kiker was deprived of her office by Judge Miller in violation of her Fourteenth Amendment rights to procedural due process. Carol Kiker clearly raised and litigated the alleged procedural due process deprivation in her brief to the Alabama Supreme Court. Thus, these issues are identical to those before the Alabama Supreme Court on direct appeal and were actually raised and necessarily decided by that court. Moreover, Carol Kiker was clearly a named party in that action, was represented by counsel, and had a full and fair opportunity to litigate the issue raised here.

While Ferrell, the alleged "co-conspirator," was not a party to the state appeal, Carol Kiker's alleged property deprivation was her employment as Register. Defendant Ferrell is incapable of dismissing a Register at all – under Alabama law, a Register may only be terminated by a circuit judge for cause by an order entered on the minutes of the court. *See* Ala. Code §§ 12-17-110(c), 12-17-24 (1995); *Ex parte Kiker*, 612 So. 2d at 456 (mandamus proceeding resulting in opinion confirming Judge Miller's power to remove plaintiff for cause). Thus, for Ferrell to be liable in the first instance under 42 U.S.C. § 1983 for acting "under color of state law," he must necessarily have *conspired* with Judge Miller such that the latter would act to deprive Carol Kiker of her constitutional rights. *Adickes v. S.H. Kress*, 398 U.S. 144 (1970); *Sykes v. State of Cal. (Dep't of Motor Vehicles)*, 497 F.2d 197 (9th Cir. 1974); *Temple v. Albert*, 719 F. Supp. 265, 267 (S.D.N.Y. 1989).

Therefore, in bringing a § 1983 claim against Ferrell, a private actor, Petitioners necessarily claimed that Ferrell conspired with Judge Miller such that the latter would act

to deprive Carol Kiker of her constitutional rights to procedural due process. However, by claiming that a conspiracy existed between Ferrell and Miller, Petitioners pled an action clearly barred by issue preclusion under Alabama law. To prove a conspiracy under § 1983, Carol Kiker was required to plead and prove that the defendants reached an understanding to deny her certain due process rights and was also required to show *an actionable wrong* to support the conspiracy. *Bailey v. Board of County Comm'rs of Alachua County, Fla.*, 956 F.2d 1112, 1122 (11th Cir. 1992). While a conspiracy allegation may be used to furnish the requisite state action for § 1983 liability, it remains necessary to show an *actual deprivation* of a constitutional right; a mere conspiracy to deprive is insufficient. *Villanueva v. McInnis*, 723 F.2d 414, 418 (5th Cir. 1984).

The particular property interest that Petitioners claimed was the subject of due process guarantees was Carol Kiker's office as Register; indeed, the thrust of her complaint is that Judge Miller's removal of her was based on illegitimate reasons (*i.e.*, her exercise of First Amendment rights) and that said removal violated procedural due process. However, these claims have been reviewed by the Alabama Supreme Court on appeal from her dismissal and adjudged not to constitute constitutional violations. Thus, the requisite "wrong" necessary to show an actionable conspiracy was found not to exist by the state appellate court.

This finding is important with regard to both the existence of the collateral estoppel doctrine and to Ferrell's ability to take advantage of said doctrine. First, it should be noted that had the Alabama Supreme Court

found a constitutional violation and reinstated Carol Kiker to her position, this finding would have prejudiced Ferrell in that the requisite "bad act" necessary to prove a conspiracy would have been found to exist. Because Ferrell's civil rights liability, if any, must be derived from Judge Miller's official act of removing plaintiff from her position, an exoneration of Judge Miller by a court of competent jurisdiction would destroy Ferrell's derivative liability for conspiracy. Therefore, Ferrell was entitled to assert collateral estoppel against Carol Kiker under Alabama law, which he did in the district court, the Eleventh Circuit, and now this Court. *See Cons[illegible]tine*, 545 So. 2d at 756. Moreover, as the Alabama Supreme Court has found no constitutional violation, and thus no deprivation of a constitutional right, Carol Kiker's claim was defective as a matter of law, and was thus vulnerable to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

C. Petitioners' Counter-Arguments Regarding Preclusion are Meritless.

In connection with both the *Rooker-Feldman* jurisdictional preclusion issue and the collateral estoppel issue, Petitioners renew their contentions that the procedural due process issues Carol Kiker raised in this proceeding were not before the Alabama Supreme Court and were not "actually decided" by it. Petitioners posit that (despite Carol Kiker's filing of a notice of *appeal* from Judge Miller's order dismissing her as Russell County Registrar, and despite the styling of her briefs in the

Alabama Supreme Court as briefs on *appeal*), the proceedings before the Alabama Supreme Court were actually pursuant to common-law *certiorari* rather than appeal. Petitioners further argue that because the Alabama Supreme Court's review was necessarily confined to the strictures of *certiorari*, under the rationale enunciated in *Webb v. State of Ala.*, 850 F.2d 1518, 1520 (11th Cir. 1988) (a case upon which she places heavy reliance) the Alabama Supreme Court's resolution of this matter is in her view not entitled to preclusive effect.

This argument is completely meritless. The Alabama Supreme Court issued an order finally disposing of its review of Carol Kiker's claim on August 20, 1993, stating as follows:

> Per Curiam *Affirmed*. No opinion. See Rule 53(a)(1) and (a)(2)(A), Ala. R. App. P.

Kiker, 629 So. 2d at 453 (emphasis added). On the same day, the Alabama Supreme Court issued its "Certificate of Judgment of *Affirmance*," which provided as follows:

> The *appeal* in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the *judgment* of the Court below is *affirmed*.

Id. (emphasis added) Respondent's App. 3.[10]

---

[10] Petitioners cannot suggest that the Alabama Supreme Court's affirmance without opinion signifies that Carol Kiker's appeal was given less than full consideration and cannot estop her from asserting the same claims in federal court. To the contrary, the Alabama court's decision cites Rule 53(a)(2)(A) of the Alabama Rules of Appellate Procedure, which provides that

Thus, the Alabama Supreme Court has necessarily determined that the proceedings before it were in the nature of an appeal, not a petition for an extraordinary writ. Its Order and Certificate *affirm* the *judgment* of Judge Miller; they do not *deny* any application for extraordinary writs. There is no indication from the Alabama Supreme Court's Order and Certificate that it was denying (or had considered) any petition for an extraordinary writ under Rule 21(a) or (c) of the Alabama Rules of Appellate Procedure. Thus, the Alabama Supreme Court has necessarily concluded that the Order entered by Judge Miller was a *judgment* that would support an appeal and not another type of order that would support only an application for a mandamus or certiorari.

Beyond the orders issued by the Alabama Supreme Court, it is plain from a cursory review of the documents filed by Carol Kiker in seeking state appellate review of the order removing her from office that she was not seeking certiorari review. The Alabama Rules of Appellate Procedure require the filing of a petition for an extraordinary writ with the *clerk of the appellate court*, complete with: a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the

---

it may affirm a judgment "when the order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous." This holding necessarily affirmed Judge Miller's factual findings and rejected Carol Kiker's contentions on appeal to the Alabama Supreme Court, which, like the petition to this Court, concerned only her due process issues.

record essential to an understanding of the matters set forth in the petition. Ala. R. App. P. 21(a). Carol Kiker's Notice of Appeal filed in Russell County contained none of these elements, nor did her brief contain portions of the record necessary to understand the issues involved (primarily because the trial court clerk's office, as is customary in the case of *appeals* from lower courts, prepared the records itself in accordance with Rule 10(b) of the Alabama Rules of Appellate Procedure). Thus, the documents filed by Carol Kiker to instigate review did not constitute a *bona fide* application for a writ of certiorari.

Even if the Alabama Supreme Court erred, however, in its procedural characterization of the matter before it as an appeal, its decision is now final, and under 28 U.S.C. § 1738, procedurally binds both Petitioners and reviewing courts in this proceeding just as much as would a substantive determination. Carol Kiker, in order to challenge the Alabama Supreme Court's characterization of the review proceeding as an appeal rather than an application for writ of certiorari, should have requested that court to explicitly rule on that issue, or to request that court to correct its "error" via rehearing; however, as she did not raise this issue at any time in the state proceedings or in a timely filed petition for writ of certiorari to this Court, she cannot collaterally attack the Alabama Supreme Court's procedural ruling now.

Moreover, even if she were able to raise such a challenge, the arguments she advances for distinguishing "pure" appellate review of her dismissal from certiorari review lose much of their strength in the context of this case. While the Eleventh Circuit, construing Alabama law, ruled in *Webb* that a former foster parent could not raise

due process issues in the context of certiorari review of an Alabama Department of Pensions and Security panel in the family court division of the Circuit Court of Montgomery County, it is a much different proposition to state that a discharged judicial employee cannot raise due process issues on "certiorari" review of her termination. Indeed, in much more analogous factual settings, Alabama appellate courts have considered and decided due process issues raised by terminated employees in certiorari proceedings. For example, in *Holloway v. Personnel Bd. of Jefferson County*, 528 So. 2d 341 (Ala. Civ. App. 1988), not only was certiorari held to be the proper method of review of a panel reviewing the termination of a county employee, but the Court also considered the employee's due process deprivation claim and resolved it against him. *Id.* at 342-43. The court similarly considered and rejected the due process claims of a dismissed county employee in *Minton v. Personnel Bd. of Jefferson County*, 406 So. 2d 435, 436-37 (Ala. Civ. App. 1981). Finally, although concluding that the petitioner had no standing to raise a due process issue, the Court of Civil Appeals did not find the scope of certiorari review any barrier to its consideration of due process in *Marshall Durbin & Co. v. Alabama Dep't of Envtl. Mgt.*, 537 So. 2d 490, 493-94 (Ala. Civ. App. 1987), *rev'd on other grounds*, 537 So. 2d 496 (Ala. 1988).

In fact, the Alabama Supreme Court has held that, not only are due process issues properly raised in proceedings seeking a common law writ of certiorari, but Alabama courts are specifically *required* to review due process issues on petition for common law certiorari. In *Evans v. City of Huntsville*, 580 So. 2d 1323 (Ala. 1991), a former waste treatment worker employee brought an

action against his former employer (a municipality) in an Alabama circuit court seeking issuance of a common law writ of certiorari to challenge the city's termination of his employment. On appeal from the circuit court, the Alabama Supreme Court held that the employee's due process rights were violated by a procedure that allowed him to be discharged simply for cursing at his supervisor. Instructive is the following language from the *Evans* opinion discussing the scope of review on common law certiorari due to be employed by Alabama courts:

> Because there is no statutory right to appeal decisions of the City Council in employment cases, the circuit court properly utilized common law certiorari to review the decision. *Personnel Bd. of Jefferson County v. Bailey*, 475 So.2d 863, 867 (Ala.Civ.App.1985). Therefore, its scope of review was limited to determining if the decision to terminate Evans was supported by legal evidence and if the law had been correctly applied to the facts. *Ex parte Bracken*, 263 Ala. 402, 405, 82 So.2d 629, 631 (1955); *Bailey, supra*, at 868. In addition, the court was responsible for reviewing the record to ensure that the fundamental rights of the parties, *including the right to due process*, had not been violated. *Ex parte Greenberg*, 395 So.2d 1000, 1002 (Ala. 1981).

Evans, 580 So. 2d at 1325 (emphasis added). This language clearly indicates that Petitioners' contention that Carol Kiker was "prevented" from raising or obtaining meaningful review of her procedural due process claims in the Alabama Supreme Court is completely ludicrous, and illustrates this case's complete dissimilarity from

Webb, wherein it was "uncertain" whether the due process claims could have been raised before the judicial body.

Thus, Petitioners have failed to show that Carol Kiker was entitled to only certiorari review in the Alabama Supreme Court, that they were provided only certiorari review, or that in receiving only certiorari review, she was somehow deprived of her due process rights.[11]

Despite their extensive efforts to expose the apparent indecision among the Circuits regarding the application and fairness of the *Rooker-Feldman* doctrine, Petitioners were not, as they suggest, caught between a proverbial rock (the alleged unavailability of a forum in which to raise her due process claims in state court) and a hard place (the district court's dismissal of the case based on its finding that her claims were precluded). Contrary to Petitioners' claim that they were confronted with a "legal quagmire" regarding their rights following the entry of Judge Miller's order removing Carol Kiker from office, it is clear that she both had and exercised her right to have that order reviewed in a meaningful way by the Alabama Supreme Court.

---

[11] Although Petitioners correctly note that under Alabama law, "certiorari cannot be exercised to review the judgment as to its intrinsic correctness," the appellate court will examine whether "the proceedings were valid and regular" and whether "there is any evidence to support the [trial court's] order." *Alabama Elec. Co-operative, Inc. v. Alabama Power Co.*, 278 Ala. 123, 176 So. 2d 483, 485 (1964). While its scope of inquiry is limited, this form of review still satisfies minimum due process requirements.

Ultimately, the sole question Petitioners present to this Court is whether Carol Kiker had the opportunity to assert, in connection with review of her dismissal in the Alabama Supreme Court, claimed procedural defects in Judge Miller's conduct of her show cause proceedings. The governing law of Alabama and the record on appeal clearly indicate that not only *could* she raise her procedural due process claims on appeal or certiorari to Alabama's highest court, but also that she *did* so. Because the Alabama Supreme Court necessarily ruled that Carol Kiker's due process contentions were meritless, she may not renew them in a separate original § 1983 action in federal court, as the district court in this case correctly noted. As neither *Rooker-Feldman* nor collateral estoppel permit maintenance of these claims, the district court properly dismissed them on motion of the Defendants, and the Eleventh Circuit did not err in affirming the judgment.[12]

CONCLUSION

For the foregoing reasons, the orders of the United States District Court for the Middle District of Alabama dismissing Carol Kiker's claims against John Pelham Ferrell were correct, and were properly affirmed by the

[12] Petitioners' failure to demonstrate that Ferrell "reached an understanding" with Judge Miller to violate any of Petitioners' rights constitutes a separate and independent ground warranting affirmance of the judgment in favor of Ferrell against Carol Kiker.

Eleventh Circuit. Granting the petition for a writ of certiorari in this case would therefore serve no purpose. Petitioners' request for certiorari review should therefore be denied.

Respectfully submitted this the 22nd day of January, 1998.

RONALD G. DAVENPORT
WILLIAM H. WEBSTER
Attorneys for Respondent
J. Pelham Ferrell

RUSHTON, STAKELY, JOHNSTON
& GARRETT, P.A.
184 Commerce Street
Post Office Box 270
Montgomery, Alabama 36101-0270
(334) 206-3100

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE
MIDDLE DISTRICT OF ALABAMA,
EASTERN DIVISION

CAROL KIKER, Plaintiff, v. PAUL J. MILLER, JR., individually and as Circuit Judge of Russell County, Defendant.	)	CIVIL ACTION NO. 94-T-56-E

JUDGMENT

(Filed Apr. 12, 1996)

On the 12th day of April 1996, after this cause had been submitted to a Jury, a verdict was returned as follows:

> 1. Has plaintiff Carol Kiker established by a preponderance of the evidence that her activities regarding a pay raise for state court personnel were a substantial, that is, a motivating factor for her firing?

Yes ___
No X

XXX

DONE, this the 12th day of April, 1996.

/s/ Gloria M. Morgan
Foreperson

Accordingly, it is the ORDER, JUDGMENT, and DECREE of the court that judgment is entered in favor of defendant J. Paul Miller, Jr., and against plaintiff Carol Kiker, with plaintiff Kiker taking nothing by her complaint.

IN THE SUPREME COURT OF ALABAMA

August 20, 1993

1920702

Carol Kiker, Register, 26th Judicial Circuit v. Hon. Paul J. Miller, Jr., Judge, 26th Judicial Circuit. (Russell: CV-92-5040)

CERTIFICATE OF JUDGMENT

of Affirmance

The appeal in this cause having been duly submitted, IT IS CONSIDERED, ORDERED AND ADJUDGED that the judgment of the court below is affirmed.

IT IS FURTHER ORDERED that the costs of appeal be taxed against the appellant(s) as provided by Rule 35, Alabama Rules of Appellate Procedure.

NO OPINION.

PER CURIAM – Maddox, Almon, Shores, Adams, Houston, Steagall and Ingram,

JJ., concur.